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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 292

HAL R. COX, ALYCE LEE COX, FLOYD CALDWELL, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EDWIN MECHEM,
W. C. WHATLEY,
LAFEL E. OMAN,
Counsel for Petitioners.

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Petitioners,

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THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on June 21, 1951 in causes 4148 and 4201 of that Court, which causes were consolidated by the Court for appeal purposes.

Opinions Below

The District Court did not write an opinion.

The opinion of the Court of Appeals for the Tenth Circuit (R. *1-13) is not reported as yet.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 21, 1951. An order denying

petition for rehearing was entered on July 31, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

Questions Presented

1. Whether, in the determination of just compensation for grazing lands taken by the United States of America through condemnation proceedings, it is competent to consider the availability and accessibility of the public domain adjacent thereto and which theretofore had been administered under the Taylor Grazing Act of June 28, 1934, and used in conjunction with the grazing lands taken under a permit issued by the Secretary of the Interior.

2. Whether it is competent to use the formulae generally adopted and accepted by private individuals in arriving at the fair market value of a livestock ranch in the determination of just compensation for grazing lands taken by the United States of America through condemnation proceedings, when such grazing lands so taken have been used and developed, in conjunction with the adjacent public domain, as a livestock ranching unit, under a permit issued by the Secretary of the Interior in the administration of the public domain under the Taylor Grazing Act of June 28, 1934.

3. What is the measure of just compensation for grazing lands taken by the United States of America through condemnation proceedings, when the grazing lands so taken have been used and developed in connection with the public domain, under a permit from the Secretary of the Interior in the administration of the public domain under the Taylor Grazing Act of June 28, 1934, as a livestock ranching unit, and the United States of America, coincidental with the taking by condemnation, withdraws its permit to graze the public domain?

Statute Involved

1. Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1270, amended August 6, 1947, 61 Stat. 790, 43 U. S. C. Sec. 315 (b), provides:

> "The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. * * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them. * * *. No permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this act shall not create any right, title, interest or estate in or to the lands."

2. The Act of July 9, 1942, 56 Stat. 654, 43 U. S. C. Sec. 315 (q), provides:

> "That whenever use for war purposes of the public domain or other property owned by or under the con-

trol of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be cancelled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States."

Statement

The United States of America on April 3, 1945, instituted proceedings in the United States District Court for the District of New Mexico, being civil cause No. 834, to condemn 556,032 acres of land in Dona Ana and Otero Counties, New Mexico for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the national emergency, for use in connection with the White Sands Proving Grounds, Fort Bliss area. (R. 3-7, 18, cause No. 4148; R. 1-5, 8, 19, cause No. 4201) The lands were described by exterior boundaries (R. 4-5, cause No. 4148; R. 3-4, cause No. 4201), and for the most part consisted of the public domain to which private persons held grazing permits under the Taylor Grazing Act. The permittees, amongst whom were the petitioners, owned adjacent lands in fee or held leasehold estates from the State of New Mexico in adjoining lands, and had developed their privately owned or leasehold lands and the Taylor Grazing permit lands into livestock ranching units. (R. 73, 74, 76, 82, cause No. 4148; R. 43, 44, 51, 52, 53, 47, cause No. 4201)

On October 16, 1946, the United States of America filed civil cause No. 1149 in the United States District Court for the District of New Mexico by which it sought to condemn

the fee title and leasehold estates to 427,120.98 acres, including the lands here involved. (R. 34-39, cause No. 4148; R. 29-34, cause No. 4201) These lands were in general the same lands embraced in cause No. 834 and were likewise described by exterior boundaries. (R. 35-37, cause No. 4148; R. 30-32, cause No. 4201) The petition in this cause did contain the allegation that a large portion of the lands were then owned by the United States and that it did not, by the institution of that proceeding, admit the existence of any rights in such public lands in favor of any of the named defendants or any other person whomsoever. (R. 38, cause No. 4148; R. 33, cause No. 4201)

The title to and possession of the lands were taken and commissioners appointed by the Court made awards both for rentals and for the taking. (R. 26-27, 29-30, 62-63, 65-67, cause No. 4148; R. 25-26, 40, cause No. 4201) The Government thereupon appealed from these awards and the causes were tried to the juries and judgments entered in accordance with the verdicts.

The trial court in cause No. 834 Civil entered its pretrial order on September 19, 1949, ordering that the issue to be tried in that cause was the reasonable rental value of the property of the defendants, described in the petition, between July 1, 1945, and October 16, 1946, in arriving at which the jury would be instructed that it would take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which each such ranch was held, and any other factor which may and is usually used and considered between private individuals in leasing or renting such ranches; to all of which the plaintiff by its attorneys duly excepted. (R. 73, cause No. 4148; R. 43, cause No. 4201)

The trial court in cause No. 1149 Civil entered its pretrial order on September 19, 1949, ordering that the issue

to be tried in that cause was the reasonable value of the property of the defendants, described in the petition, on October 16, 1946, in arriving at which the jury would be instructed that it would take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which each of said ranches was held, and any other factor which may and usually is used and considered between private individuals in buying and selling such ranches; to all of which the plaintiff by its attorneys duly excepted. (R. 74, cause No. 4148; R. 44, cause No. 4201)

The issues thus defined by the trial court were tried and the witnesses both for the plaintiff and the defendants, in estimating the rentals and reasonable values of the respective ranches, regarded each as a ranching unit, and were permitted, in arriving at their estimations of these values, to apply the formulae and take into consideration the elements ordinarily and customarily considered in arriving at the market value of livestock ranches. The Government witnesses, however, in giving their estimates of these values first estimated the value of the entire ranching unit and then allocated to the lands taken the portion thereof which they felt the state lease and fee lands contributed to the ranching unit. (R. 378-382, cause No. 4148; R. 162-164, cause No. 4201) The jury in each case was instructed that it could not make awards for the grazing permits to graze the Federal domain, but that it could and should consider the availability of the Federally owned land and what value, if any, its accessibility or availability actually added to the privately owned land and state leasehold interests. (R. 389, cause No. 4148; R. 175, cause No. 4201)

The verdicts of the juries were returned and the Court entered judgments in accordance therewith. The judgment

in cause No. 4148 was entered on April 25, 1950, (R. 77-81) and in cause No. 4201 on June 27, 1950. (R. 47-51)

The Government then took an appeal in both cases to the United States Court of Appeals for the Tenth Circuit, which Court consolidated the cases for the appeal. The opinion and judgments of this Court were entered on June 21, 1951, (R. *1-14) and an order denying the appellees' petition for rehearing was entered on July 31, 1951. (R. *18) On August 8, 1951, orders of the Court were entered staying the mandates of the said Court for a period of thirty days from August 10, 1951. (R. *18)

Specification of Errors to Be Urged

The United States Court of Appeals for the Tenth Circuit erred:

1. In holding that the availability and accessibility of the Federal domain cannot be considered in the determination of just compensation for the property taken.

2. In holding that the formulae and elements customarily and ordinarily used and considered by private individuals in arriving at the fair market value of a ranch as an economic unit cannot be applied or considered in the determination of just compensation for a ranch taken, when part of the ranching unit consists of public domain used under permit from the Secretary of the Interior and the Government cancels its permit coincidental with the taking.

3. In holding that a declaration of taking in condemnation proceedings operates to cancel permits to graze the public domain issued by the Secretary of the Interior in the administration of the Taylor Grazing Act of June 28, 1934, when the declaration of taking includes the public domain covered by such permits as well as the base fee and leasehold lands.

4. In reversing the judgments of the District Court.

Reasons for Granting the Writ

These cases clearly involve principles, the settlement of which is of importance to the public as distinguished from that of the parties herein. This appears to be a case of first impression and the Court of Appeals for the Tenth Circuit which reversed the judgments of the District Court was divided in its opinion. Because of the steadily increasing number and size of defense projects and other Governmental projects in all the Western States wherein lie great areas of public domain administered by the Secretary of the Interior under the Taylor Grazing Act of June 28, 1934, and by other Governmental departments and agencies, the settlement of the principles involved in these cases is of utmost importance to the entire ranching industry of the West. The effect of the opinion of the Court of Appeals for the Tenth Circuit is to make uncertain the measure of just compensation for the livestock ranches taken by the United States of America through condemnation proceedings when the ranches have been used and developed as such in conjunction with the use of the Federal domain.

The livestock ranching industry has been and will continue to be depressed and in a state of uncertainty, especially in areas of expanding Gevernmental installations, until this Court has settled the principles herein involved. This Court has in many cases defined just compensation and has repeatedly held that the market value of the property is to be determined as of the time of the taking. *Seaboard Air Line Ry. Company* v. *United States,* 261 U. S. 299, 304; *Jacobs* v. *United States,* 290 U. S. 13, 17; *Olson* v. *United States,* 292 U. S. 246, 255; *United States* v. *Klamath and Moadoc Tribes of Indians,* 304 U. S. 119, 123; *Danforth* v. *United States,* 308 U. S. 271, 283; *United States* v. *Miller,* 317 U. S. 369, 373, 374. But we are here confronted with the

question of what elements or considerations are to enter into the determination of just compensation for a livestock ranch, which has been developed and used in conjunction with a permit to graze the public domain, and this question has never been decided by this Court.

As pointed out by the Honorable Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit, in his dissenting opinion: "The hardy pioneers who settled the semi-arid West early learned that ample water for livestock was of paramount importance. Hence, they acquired by homesteading and by purchase, tracts of land where water supply from streams, springs, and wells could be developed that would enable them to carry not only the livestock that could be grazed on their privately-owned lands, but many more livestock that could be grazed on adjacent public domain where grass was abundant, but little water available. By controlling the lands which would supply water they controlled the use of the adjacent public domain. Enduring privations, suffering hardships, and encountering grave dangers, these settlers developed livestock raising enterprises that provided them with homes and a means of livelihood. They first used the public domain under an implied license. Ultimately, they utilized the public domain under preferential permits issued under the Taylor Grazing Act. * * * In valuing privately-owned ranch properties which control available water supply in the semi-arid West, buyers and sellers for many years have taken into consideration the availability and accessibility of public lands which can be utilized in connection with the privately-owned lands and water under preferential grazing privileges. Without available water supply to provide drink for livestock grazing on public domain, the public lands are of little value. But, their availability and accessibility for use in connection with private lands which control the water

supply substantially increase the value of the privately-owned lands."

However, under the opinion of that Court, the United States of America, if it take privately owned ranch properties by condemnation, need compensate only for such, considered as completely isolated tracts, without regard for the availability and accessibility of the public domain and without regard for their development as economic ranching units. The fair market value of such ranching units is not to be considered.

Since a large portion of the ranching units in the Western states have been developed in conjunction with the use of the public domain and such use is of generally recognized public importance and benefit, the entire ranching industry and the entire public are vitally interested in and concerned with the settlement of the principles herein involved.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN MECHEM,
W. C. WHATLEY,
LAFEL E. OMAN.
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 292

HAL R. COX AND ALYCE LEE COX, FLOYD CALDWELL AND W. A. ABERNATHY; CHARLES J. MAPEL; MARY COE BLEVINS, PETITIONERS

v.

UNITED STATES OF AMERICA

R. E. BEASLEY, ELSIE S. BEASLEY AND SARAH VIRGINIA BEASLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 1-7),[1] with a

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[1] The record in this Court is in three individually paginated sections, i.e., the record in C.A. 10, No. 4148, *Hal R. Cox, et al.*

dissenting opinion by Judge Phillips (R. 7-13), is reported at 190 F. 2d 293.

JURISDICTION

The judgments of the Court of Appeals were entered June 21, 1951 (R. 13-14). A petition for rehearing was filed July 19, 1951 (R. 15-17), and denied July 31, 1951 (R. 18). The petition for a writ of certiorari was filed August 30, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether just compensation for lands used as a cattle ranch in conjunction with adjacent public lands can be measured by the carrying capacity of the entire unit, including the public lands, when the public lands were used in the unit pursuant to a revocable permit.

2. Whether the availability of the public lands could be considered in determining the adaptability of private lands as base land for a cattle ranch when the permit for use of the public lands was revoked coincidentally with the taking of the private lands.

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v. *United States;* the record in C.A. 10, No. 4201, *R. E. Beasley, et al.* v. *United States;* and the record of the proceedings in both cases in the court of appeals. In this brief, references to the records in the individual cases will be indicated by (R. —, No. 4148) or (R. —, No. 4201), as the case might be. References to the proceedings in the court of appeals will be indicated simply (R. —).

STATUTES INVOLVED

1. Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315b, provides:

> * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

2. The Act of July 9, 1942, 56 Stat. 654, as amended by the Act of May 28, 1948, 62 Stat. 277, 43 U.S.C. 315q, provides:

> Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States.

STATEMENT

The United States, on April 3, 1945, instituted a proceeding, Civil No. 834, to condemn the exclusive use of 556,032 acres of land in Dona Ana and Otero Counties, New Mexico, for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the national emergency, for use in connection with the White Sands Proving Grounds, Fort Bliss area (R. 3-7, 18, No. 4148; R. 1-5, No. 4201). The lands were described by exterior boundaries (R. 4-5, No. 4148; R. 3-4, No. 4201), and consisted for the most part of public lands for which private individuals held grazing permits under the Taylor Grazing Act for use in connection with ranching operations on adjacent lands owned in fee or leased from the State of New Mexico (R. 88-90, 285-286, 322-323, 337, 350, No. 4148; R. 33, 62-66, No. 4201).[2] The Government had previously leased privately owned lands in the area by co-use agreements under which the ranchers used the lands for grazing and the Government used the area as a gunnery range (R. 110, 120, No. 4148; R. 85-86, 95, 102-103, No. 4201). The term of the temporary taking was duly extended to cover the years ending June 30, 1946, and June 30, 1947 (R. 7-9, No. 4148; R. 6-9, No. 4201). However, it was subsequently determined that it would be necessary and

[2] As an example, the Cox ranching unit was composed of 1,611 acres of federal lands under permit, 920 acres leased from the State, and 230 acres owned in fee (R. 196, 285-286, No. 4148). In fact, the percentage of federal lands in the various ranch units ranged from 60% to more than 85%.

advantageous to acquire most of the lands in fee, and on October 16, 1946, Civil No. 1149 was filed, covering in general the same lands included in Civil No. 834, to condemn the fee title to 427,-120.98 acres (R. 34-39, No. 4148; R. 29-34, No. 4201). The lands involved in this proceeding were likewise described by exterior boundaries (R. 35-37, No. 4148; R. 30-32, No. 4201), but the petition referred to the fact that a large portion of the lands was federally owned and stated that the Government did not admit the existence of any rights in such public lands in favor of any of the named defendants (R. 38, No. 4148; R. 33, No. 4201). Subsequently, an amended petition was filed in Civil No. 834 to show that the temporary taking of the lands also involved in Civil No. 1149 was for a term of years ending October 16, 1946 (R. 17-24, No. 4148; R. 16-25, No. 4201). Ever since the filing of Civil No. 834 in 1945, the Government has been in exclusive possession of the lands here involved (R. 5, 72, No. 4148; R. 98-99, 103, No. 4201).

Petitioners here are the owners of five ranches which were thus taken, at first temporarily and then permanently, *i.e.,* the Beasley, Cox, Caldwell, Blevins and Mapel ranches. Declarations of taking were filed and deposits of estimated just compensation made at various times prior to trial, except that no declarations were filed or deposits made in connection with the temporary takings of the Cox and Mapel ranches (R. 9-13, 24-26, 39-42,

44-50, 52-54, No. 4148; R. 9-12, 35-37, No. 4201). Commissioners returned awards substantially in excess of the deposits (R. 26-27, 29-30, 62-63, 65-67, No. 4148; R. 25-26, 40, No. 4201), and the United States appealed from orders confirming the awards and demanded trial by jury (R. 28-29, 31, 32-33, 64-65, 68, 69-70, No. 4148; R. 27-28, 41-43, No. 4201).

At a pretrial conference one of the questions taken up was whether the public domain, for which petitioners held grazing permits, should be taken into consideration in determining the value of the lands condemned (R. 90, No. 4148). It was the Government's position that compensation for the lands taken should be made without regard to the use of the public lands, and that the ranchers' only recourse for loss of grazing privileges was under the Act of July 9, 1942, 56 Stat. 654, 43 U.S.C. 315q, *supra,* p. 3, providing for an administrative determination as to the amount of payment for such loss (R. 94-95, 102-103, No. 4148). On the other hand, petitioners contended that, in view of the governmental policy in permitting use of the public lands for grazing and the practice among ranchers of valuing ranches for purposes of sale by the carrying capacity of the ranch unit, including the public domain, they were entitled to the added value resulting from the adjacent public lands (R. 90-91, 99-102, 103-104, No. 4148). The court agreed with petitioners' contention and issued pre-trial orders in each case providing that in

arriving at the rental value and fee value of the property taken "the jury will be instructed that it will take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which, each such ranch is held, and any other factor which may and is usually used and considered between private individuals" in leasing or buying and selling such ranches (R. 73-74, No. 4148). The Government took exception to each of the orders (R. 73-74, No. 4148).

Pursuant to agreement reached at the pre-trial conference, Civil Nos. 834 and 1149 were consolidated for trial (R. 112-113, 116, No. 4148). The just compensation for the Beasley ranch was the subject of a separate trial (R. 97, No. 4201), while the other four ranches were tried together (R. 122, No. 4148). Consistently with the pre-trial orders, witnesses for the ranchers were permitted to value the various ranches as units by multiplying the carrying capacity of the ranch unit, including the public lands, by the estimated animal unit value (which was the estimated net profit from the sale of a calf and was approximately $150.00, according to the ranchers' witnesses), and adding to the product thus obtained the value of improvements (R. 124-132, 134, 153, 165-166, 189, 211-212, 223-225, 244-245, 255, No. 4148; R. 115, 118, 125-126, 139, No. 4201). Witnesses for the Government testified as to values, following the same method of valua-

tion, but using a lower animal unit value, and also valued the property taken by determining the contributory value of the fee and State lands to the unit as a whole on the basis of an apportionment of the carrying capacity (R. 289-290, 325-326, 338-339, 350-351, 369, 378-382, No. 4148; R. 161-163, No. 4201).

The jury was instructed to the effect that the Government was taking only the fee land and that it should determine only the value of such land, but was told that, in doing so, it could take into consideration as an element of value the accessibility and availability of the lands covered by the grazing permits (R. 389, No. 4148; R. 115-116, 139-140, 175-176, No. 4201). There were no exceptions to the instructions as given, and in fact instructions requested by the Government under pressure of the pre-trial order were similar in substance (R. 77, No. 4148; R. 177, No. 4201). The jury verdicts were in amounts substantially in excess of the deposits (R. 74-75, No. 4148; R. 47, No. 4201), and the Government appealed from the judgments entered thereon (R. 77-82, No. 4148; R. 47-56, No. 4201).

The two appeals (No. 4148, *Cox, et al.,* and No. 4201, *Beasley*) were consolidated for hearing (R. 1), and on June 21, 1951, judgments were entered, reversing the judgments and remanding for further proceedings in accordance with the views expressed in the opinion of the court (R. 13-14).

The court of appeals held that, inasmuch as the grazing permits were not an interest protected by the Fifth Amendment, it was improper to determine just compensation by the value of the ranches as units, including the public lands under permit, even though the ranchers customarily bought and sold on the basis of the carrying capacity of the entire unit (R. 4-6). The court of appeals also laid down the rule that the existence of the grazing permits or, in other words, the availability and accessibility of the public lands could be considered in determining the adaptability of the private lands as base lands for cattle ranches and that the effect of such adaptability on market value was a proper element in determining just compensation, provided that consideration was also given to the possibility that the permits could be revoked by the Government at any time without any constitutional obligation to pay compensation therefor (R. 6; see also *United States* v. *Jaramillo,* 190 F. 2d 300, 302 (C.A. 10), decided on the same day). However, it was held that, inasmuch as the grazing permits here involved had been effectively revoked coincidentally with the taking of the private lands (R. 5), the public lands were no longer available and accessible for grazing purposes, and, hence, could not be considered in determining the value of the private lands (R. 6).

Judge Phillips agreed that the ranches could not be valued as an economic unit, and that there-

fore the judgments should be reversed (R. 7-13). However, he was of the view that the permits had not been effectively revoked at the time of taking (R. 8), and dissented on the ground that at the new trial the grazing permits should be considered in determining the adaptability of the private lands for cattle ranches in accordance with the principles established in the court's decision in *United States* v. *Jaramillo,* 190 F. 2d 300 (C.A. 10) (R. 7, 10-13).[3]

Petitioners filed a petition for rehearing (R. 15-17), which was denied on July 31, 1951 (R. 18).

ARGUMENT

1. Under the economic unit theory of valuation espoused by petitioners and adopted by the district court, two ranch units having the same carrying capacity would have the same market value in condemnation even if one unit were composed entirely of privately owned lands and the other were made up of 100 acres of privately owned lands and 10,000 acres of federal domain. Such a theory is patently erroneous in logic and without support

[3] In the *Jaramillo* case the Government, taking private lands adjacent to a national forest, did not interfere with grazing in the forest, and in fact Jaramillo was granted a new grazing permit after his private lands were taken. Under these circumstances, the court reversed a judgment reflecting a separate valuation for the grazing permit, but held that in determining the adaptability of the Jaramillo lands as a ranch, it was proper to take into consideration the availability of the permit land in the forest, provided that consideration were also given to the possibility that the permit could be withdrawn by the Government at any time. 190 F. 2d 300, 302 (C.A. 10).

in law. Petitioners had no compensable interest in the public lands by virtue of their grazing permits, which could be revoked at will by the sovereign without liability. Section 3, Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315b; *Osborne* v. *United States,* 145 F. 2d 892, 894, 896 (C.A. 9); *Oman* v. *United States,* 179 F. 2d 738, 741-742 (C.A. 10). Hence, even though their grazing rights were of great value in dealings with private individuals, they had no right to compensation therefor when their fee lands were taken by the Government. *Osborne* v. *United States,* 145 F. 2d 892 (C.A. 9); cf. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 70, 74-76; *Louisville Bridge Co.* v. *United States,* 242 U.S. 409; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U.S. 592; *United States* v. *Willow River Co.,* 324 U.S. 499, 510; *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 175 (C.A. 9), certiorari denied, 340 U.S. 820. And it is immaterial that in buying and selling ranch units ranchers customarily determine price by the carrying capacity of the entire unit, including the public lands. Obviously, the ranchers are buying and selling something more than fee lands, *i.e.,* the qualified right to carry on a business on the public lands. Such an element must be eliminated from the criterion of market value in a condemnation case. Cf. *United States* v. *Miller,* 317 U.S. 369, 375; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281-283; *United*

States v. *Cors*, 337 U.S. 325, 332-334. Clearly, the court below was correct in rejecting the economic unit theory of valuation (R. 4-6).

2. Neither did the court below err in holding that the public lands could not be considered in determining the adaptability of the fee lands as base lands for cattle ranches (R. 6). Before it can be said that adjacent public lands would have any effect on the market value of the fee lands as cattle ranches, it must appear reasonably probable that the public lands would be available for use in connection with the fee lands. *Olson* v. *United States*, 292 U.S. 246, 255-257; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 275-276; *Iriarte* v. *United States*, 157 F. 2d 105, 111 (C.A. 1), certiorari denied, 335 U.S. 816. Such is not the case here. As far back as 1941, the Government had begun reclaiming the public lands in the general area for military use, so that the threat of the establishment of additional projects in the area had affected the selling price of ranches on the economic unit basis (R. 310, 313-316, 333-334, No. 4148). In 1945, the Government had taken over exclusive possession of the very public lands here involved on a temporary basis (R. 5, No. 4148). Thus, when it was determined that the private lands should be taken in fee (R. 34, 37, No. 4148), there was not even a remote possibility that the public lands would be available for use in connection with ranching operations on the private lands.

Petitioners' rights to graze on the public lands had been effectively terminated (R. 5).[4] The United States had reclaimed its own public lands, and was obliged to pay for the private lands taken, but without consideration of the discontinued right to make use of public lands.

3. Contrary to the position taken in the dissenting opinion (R. 9-12), this is not a case for application of the rule that in determining value of land taken no consideration should be given to an increase or decrease resulting from the project for which the land was taken. Cf. *United States* v. *Miller,* 317 U.S. 369, 376-377. No claim is made that the Government should receive the benefit of any decrease in value which might result from the fact that the lands taken were in the midst of a rocket range. The only claim is that the revoked right to use the public lands for grazing should not be considered in determining the value of the

[4] Judge Phillips was of the view that the grazing permits had not been revoked because the Secretary of the Interior had not issued a formal order to that effect (R. 8). However, no particular form is necessary for the withdrawal or reservation of public lands. *Wolsey* v. *Chapman,* 101 U.S. 755, 769-770; *Wilcox* v. *McConnel,* 13 Pet. 498, 512-513. Even between private parties, a bare license, such as here involved (*Osborne* v. *United States,* 145 F. 2d 892, 895-896 (C.A. 9)), may be effectively revoked by any act on the part of the licensor indicating an intention to revoke, as when he makes its exercise impossible. *Geophysical Exploration Co.* v. *Klodginski,* 61 F. 2d 849, 850 (C.A. 5), certiorari denied, 288 U.S. 608; *Chavez* v. *Torlina,* 15 N. Mex. 53, 65, 99 Pac. 690. Plainly, when the United States took over exclusive control of its lands, all permits to graze thereon were effectively canceled.

fee lands. It is conceded that, just as in the example cited by the dissenting judge (R. 11-12), property owners are entitled to any enhancement inhering in their property from favorable environment. But this does not include a spurious enhancement flowing from a bare license to use adjoining land. Just as here, the property owner in the hypothetical case would not be entitled to increased compensation because he had a license to sell refreshments in the public school or park.

4. The decision of the court of appeals is clearly correct and there is no conflict. Since the questions here presented have been decided with unanimity by the circuits in which the bulk, if not all, of the cases involving the questions would arise,[5] there should not be any uncertainty as to the measure of compensation in such cases. And any hardship resulting to the ranchers has already been alleviated by Congress when it passed the Act of July 9, 1942, 56 Stat. 654, 43 U.S.C. 315q, providing for an administrative determination as to the payment to be made to a rancher for the losses suffered when public lands for which he had held a grazing permit were used for war or defense purposes.

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[5] Grazing districts under the Taylor Grazing Act have been established only in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Wyoming (43 C.F.R. (Cum. Supp.) sec. 502.1), all of which States are included in the Ninth or Tenth Circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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